STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED October 7, 2008
v	No. 282170 Ingham Circuit Court
TERRENCE JAMES JONES, Defendant-Appellee.	LC No. 06-000207-FC

Before: Markey, P.J., and Whitbeck and Gleicher, JJ.

PER CURIAM.

Defendant pleaded guilty to counts of second-degree murder, MCL 750.317, armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant later moved to withdraw his plea, and the circuit court granted the motion. Plaintiff appeals by leave granted from the order vacating defendant's plea. We affirm.

"There is no absolute right to withdraw a guilty plea once it has been accepted by the trial court." *People v Montrose (After Remand)*, 201 Mich App 378, 380; 506 NW2d 565 (1993). Regardless whether a defendant files a motion to withdraw a guilty plea before or after sentencing occurs, this Court will not reverse the trial court's ruling on the motion "absent a clear abuse of discretion resulting in a miscarriage of justice." *Id*.; see also *People v Wilhite*, 240 Mich App 587, 594; 618 NW2d 386 (2000).

The Michigan Court Rules delineate three distinct circumstances in which a defendant might move to withdraw a plea. MCR 6.310. The initial question we must consider involves which circumstance applies to defendant's motion. Defendant contended, and the circuit court agreed, that it should review defendant's motion pursuant to MCR 6.310(B), which applies when the defendant moves to withdraw "[a]fter acceptance [of the plea] but before sentence." The prosecution contends on appeal that the circuit court erred by failing to review defendant's motion under MCR 6.310(C), which states as follows:

> The defendant may file a motion to withdraw the plea within 6 months after sentence. Thereafter, the defendant may seek relief only in accordance with the procedure set forth in subchapter 6.500. If the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside, the court must give the advice or make the inquiries necessary to

> rectify the error and then give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea. If the defendant elects to allow the plea and sentence to stand, the additional advice given and inquiries made become part of the plea proceeding for the purposes of further proceedings, including appeals.

To warrant setting aside a plea under this subrule, the defendant must demonstrate some "error in the plea proceeding." *Montrose*, *supra* at 380. This Court has recognized as potential errors in a plea proceeding the ineffective assistance of counsel or a defendant's claim of innocence, provided that the record establishes these claims. *People v Haynes (After Remand)*, 221 Mich App 551, 558-563; 562 NW2d 241 (1997).

The circuit court explained its decision to apply MCR 6.310(B), in relevant part, as follows: "I believe the standard to be applied here is the standard which would pertain before sentence. The defendant attempted to offer the motion before sentence without success. At least it was heard, but it was heard clearly with an incomplete record. . . ."

We find that the circuit court erred in deciding the motion to withdraw under the post-plea, presentence provision in MCR 6.310(B). The circuit court correctly observed that at the sentencing hearing in August 2006, defendant had orally moved to withdraw his guilty plea. The record undisputedly reflects, however, that the sentencing court denied defendant's motion, prompting defendant to file a written motion to withdraw his plea in late December 2006. Because the record establishes that the circuit court ruling on July 20, 2007, from which the prosecution now appeals, involved a motion to withdraw that defendant filed *after* the imposition of his sentence, the plain language of MCR 6.310(C) properly governs the ruling on the instant motion to withdraw. *People v Hawkins*, 468 Mich 488, 500; 668 NW2d 602 (2003) (observing that the principles of statutory interpretation apply to court rule construction, and that "[w]hen the language is unambiguous, we must enforce the meaning plainly expressed . . . ."); *Haynes (After Remand)*, *supra* at 557 (holding that where the defendant filed a motion to withdraw a plea after the trial court imposed sentence, MCR 6.310(B) did not apply, notwithstanding that the Michigan Supreme Court subsequently vacated the sentence). The clear language of MCR 6.310 does not contemplate treatment of a motion to withdraw, filed while a defendant is under sentence, as relating back to an earlier motion made before the court imposed sentence.

Although the circuit court incorrectly invoked MCR 6.310(B), we find no basis for reversal of the court's ultimate ruling because the record does not substantiate that upholding the ruling would result in manifest injustice. We conclude that the evidence of record supports the circuit court's decision to grant defendant's motion to withdraw pursuant to the correct subrule, MCR 6.310(C).

The parties did not dispute the relevant procedural details of this case. Defendant retained his former counsel, Kenneth Marks, in January or February 2006. The testimony of both defendant and Marks at the July 2007 motion hearing reflected the following pertinent details: defendant requested before trial that Marks investigate several witnesses referenced in

discovery materials, but Marks did not do so[1]; defendant's original trial date in September 2006 was rescheduled for July 13, 2006; Marks and defendant had two or three days' notice of the trial date rescheduling; on July 10 or 11, 2006, Marks visited defendant in jail, advised defendant his "chances at trial" were "slim to none," and recommended that defendant accept the proffered plea bargain, pursuant to which he would plead guilty of second-degree murder, armed robbery and felony-firearm, in exchange for the prosecution's dismissal of a count of open murder and several additional charged counts; and defendant exhibited uncertainty with respect to his commitment to plea, indicating after one July 10 or 11, 2006 discussion with his mother that he would accept the plea agreement, but later that evening, after further discussion with his mother, disavowing his willingness to plead guilty.

The plea hearing, which involved defendant and the codefendant, who shot the victim, occurred on July 12, 2006. In the courtroom before the hearing, defendant again spoke with his mother regarding the plea, and elicited Marks's view that pleading represented his best option for avoiding a potential life term of imprisonment without parole, if a jury found him guilty of aiding and abetting a first-degree felony murder that occurred in the course of an armed robbery. At the outset of the plea hearing, defendant advised the circuit court that he had had sufficient time to discuss his case with Marks, and denied having any complaints about Marks. The hearing then proceeded uneventfully as the court ascertained the knowing and voluntary nature of defendant's plea, with defendant unequivocally responding to the court's many inquiries. Some hesitation did occur, however, when it came time for defendant to place the factual basis for his plea on the record, as reflected in the following relevant excerpts:

> *Marks*: May I inquire in reference to my client, please, your Honor?
>
> * * *
>
> Thank you. Mr. Jones and I have had the opportunity to discuss, as far as, the events that led up . . . on 10-16 of last year.
>
> Is that correct?
>
> *Defendant*: Yeah.
>
> *Marks*: Prior to that date, was there a time where you and [codefendant] Mitchell Fawkes discussed, as far as, robbing [the victim]?
>
> *Defendant*: Man, I got to say that?
>
> *Marks*: Yeah.

[1] Marks testified that in his judgment, the four witnesses of whom defendant had advised him were "not that important at all," in part because several of the witnesses became involved after the shooting of the victim had occurred. Although defendant argued that Marks had not effectively represented him, the circuit court opined, "I'm not prepared to say that Mr. Marks was ineffective."

Defendant: Yeah.

* * *

Prosecutor: And you arranged to pick up [the victim] to go to Bailey Street so he would be there, and you had also arranged with Mr. Fawkes to be on Bailey Street so this could happen, correct?

Defendant: (Talking with Mr. Marks off the record.)

Yeah. Yeah.

The parties do not dispute that about a month later, on August 13, 2006, defendant first voiced to the court his dissatisfaction with the plea, in a letter he wrote to the circuit court. In the letter, defendant averred that he had "said yes to alot [sic] of things that wasn't [sic] true," that he "didn't want to take the plea," which he "thought [he] could withdraw at any time," and he urged the court to set aside the plea. Defendant authored a second letter to the court on August 23, 2006, requesting to "tak[e] my plea back for several reasons." Defendant specified that (1) he was "not guilty of all of the things I pleaded to . . . , I said yes to those things because I thought that that was how we was [sic] suppose [sic] to do it, plus my lawyer didn't tell me I could say no," (2) "my lawyer through the beginning till now have [sic] not look [sic] out for my best intrest [sic] at all," and (3) "in my heart I feel as if I'm not guilty. . . . so I would like a jury trial to prove my innocence." The circuit court undisputedly misplaced defendant's letters, and had not read them before the sentencing hearing. At the sentencing hearing, the court denied defendant's oral motion to withdraw his plea. Defendant, through substitute counsel, then submitted the current written and documented motion to withdraw his guilty plea.

In the circuit court's July 2007 bench opinion granting defendant's motion to withdraw, the court thoroughly and accurately reviewed the several pertinent portions of the record, including the July 12, 2006 plea hearing, the August 30, 2006 sentencing transcript, the contents of defendant's handwritten letters, and his declarations of innocence in connection with his later motion to withdraw. The circuit court then summarized as follows:

> I mean, from before the time he was sentenced, he's been very, very consistent in terms of the position that he took. And basically consistent with what we've hear[d] today. There is absolutely no prejudice, that I can see, of any kind to the People's case now, because . . . if the co-defendant Mr. Fawkes' [sic] commits perjury, he can buy another mandatory life term. . . . But, taken [sic] all this together and adding it up, I think to impose this sentence and, and have this defendant convicted as stands, with this conviction on his record, in light of the repeated and consistent statements that he's made, and in light of the qualified, somewhat qualified statements that he made at the time [of the plea]. . . . I agree with [the prosecution] to this extent, the statement, "Man, do I have to say that," is subject to a number of interpretations. But one obvious interpretation is, you know, there's a question in my mind about whether or not I'm being asked [sic] it true here and it's also true that he repeats Mr. Marks' answer. And then after a conference, in effect says the same thing and repeats it. And I think . . . in all fairness, and in considering the . . . grave nature of this charge, that he's entitled

to have his day in court. And he's entitled to have his trial. The Court will authorize him to withdraw his plea.

Plaintiff characterizes defendant's "Man, do I have to say that" comment as expressing concern about admitting guilt in the presence of the victim's friends and family. Another reasonable interpretation of defendant's statement, however, especially in the context of the letters defendant sent after the plea hearing, is that defendant objected to having to admit to specific actions he felt he did not undertake. As the fact finder at the hearing, the circuit court remained free to credit the latter interpretation, and we defer to the circuit court's superior ability to assess witness credibility. MCR 2.613(C).

In summary, none of the circuit court's factual findings regarding the record qualify as clearly erroneous. MCR 2.613(C). Furthermore, the circuit court invoked a type of "error in the plea proceeding" that this Court found potentially warranting relief under MCR 6.310(C), namely defendant's claim of innocence. *Haynes (After Remand)*, *supra* at 562-563.[2] And in light of defendant's repeated and consistent claims of innocence, which he initially raised twice before the sentencing hearing in the temporarily misplaced letters, voiced again at the sentencing hearing, reiterated in written filings beginning in 2006, and expressed again in testimony at the July 2007 hearing regarding his motion to withdraw, we cannot characterize the circuit court's ultimate decision to grant defendant's motion to withdraw his guilty plea as "a clear abuse of discretion resulting in a miscarriage of justice." *Montrose (After Remand)*, *supra* at 380. Because we can uphold the circuit court's ruling under MCR 6.310(C), any error arising from the court's application of MCR 6.310(B) is harmless.

Affirmed.

/s/ Jane E. Markey
/s/ William C. Whitbeck
/s/ Elizabeth L. Gleicher

[2] Although this Court in *Haynes (After Remand*) reversed the trial court's finding that the three defendants' claims of innocence justified setting aside their pleas, this Court emphasized the lack of support for the defendants' claims. For example, the Court highlighted that defendant Haynes first raised a claim of innocence "after the appellate process and five years after tendering his guilty plea." *Id*. at 562. Unlike defendant Jones in this case, the other two defendants in *Haynes* also raised belated and unsupported claims of innocence. *Id*. at 569, 573.